



February 19, 2002

Ms. Kathleen Finck
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2002-0799

Dear Ms. Finck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158731.

The City of San Antonio (the "city") received a request for the bids submitted in response to a request for proposals for employee benefits services, which included bids from Employee Benefits Administrators (EBA), USC Health Network (USC), Employee Benefit Services (EBS), San Antonio Employers Health Alliance Network (SAEHAN), Aetna, Humana, and Blue Cross. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, the city notified third parties of the request because their proprietary interests are implicated.¹ As of the date of this ruling, this office has not received responses from any of the third parties objecting to the release of their proposals. The city did not submit proposals from EBS, SAEHAN, or Blue Cross. Therefore, this ruling does not address whether these proposals are subject to disclosure, and we only address the applicability of sections 552.104 and 552.110 in relation to the proposals from Aetna, EBA, Humana, and USC. We have considered the exceptions you claim and have reviewed the submitted sample of information.²

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances)

²We assume that the "sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Governmental bodies may withhold bid information while governmental officials are in the process of evaluating the proposals and asking competitors to clarify their bids. Open Records Decision No. 170 (1977). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990).

In this case, you inform us that the contract has been awarded. After reviewing your arguments, we conclude that you have failed to demonstrate the applicability of section 552.104 because you have failed to show that the city is involved in a particular competitive situation. We therefore conclude that the city may not withhold the proposals from Aetna, EBA, Humana, or USC under section 552.104.

You further argue that the requested bids are excepted from disclosure under section 552.110(b). Section 552.110(b) protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(b). The governmental body or interested third party raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. *Id.*; *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). However, the city has made only conclusory statements in support of its claim that section 552.110(b) operates to except the information from Aetna, EBA, Humana, and USC. We thus conclude that the city has failed to establish that this information is confidential as commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b). Therefore, except for certain e-mail addresses in EBA's information, the Aetna, EBA, Humana, and USC proposals must be released to the requestor in their entirety.

The submitted information from EBA contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." *See* Gov't Code § 552.137(a). As there is

no indication that the individuals to whom the e-mail addresses belong have consented to their release, the city must withhold the e-mail addresses in the EBA information that we have marked under section 552.137 of the Government Code. *See* Gov't Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release). EBA's remaining information, and information submitted to the city by Aetna, Humana, and USC must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 158731

Enc. Submitted documents

c: Mr. J. Devin Zakrzewski
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Texas True Choice
19230 Stone Oak Parkway, Suite 375
San Antonio, Texas 78258
(w/o enclosures)

Aetna U.S. Healthcare
400 Northwest Loop 410, Suite 500
San Antonio, Texas 78229-5123
(w/o enclosures)

Employee Benefit Administrators, Inc.
6800 Park Ten Boulevard, Suite 175-West
San Antonio, Texas 78213
(w/o enclosures)

Humana, Inc.
8431 Fredericksburg Road
San Antonio, Texas 78229-3300
(w/o enclosures)